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IN THE

Supreme Court of the United States

October Term, 1968

No. 720

CHARLES CACI, also known as, BOBBY MILANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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CHARLES CACI, also known as, BOBBY MILANO,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES CACI, also known as, BOBBY MILANO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on July 30, 1968.[1]

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reprinted at page 18, *infra* of the Appendix hereto.

[1] United States of America vs. Charles Caci, also known as, Bobby Milano; Stephen A. Cino; Pasquale A. Natarelli, also known as, Pat Natarelli; Frederico G. Randaccio and Louis Sorgi.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered July 30, 1968. The Petition for a rehearing was denied on October 8, 1968. The jurisdiction of this court is invoked under 28 U. S. C. section 1254 (1).

Questions Presented

I. Whether the conduct alleged under Count I of the Indictment is within the scope of the Federal legislative control intended in 18 U. S. C. 1951, the so-called "Hobbs Act."

II. Whether the requirements of "substantial due process" were violated by allowing a conviction under Count II of the Indictment to rest upon proof which utterly failed to demonstrate that the petitioner Charles Caci, also known as, Bobby Milano possessed the necessary *mens rea.*

III. Whether the court committed substantial error by refusing to charge the jury with respect to an alibi defense as submitted by counsel for the petitioner Frederico G. Randaccio.

IV. Whether the decision of the Second Circuit Court of Appeals on the issue of the selection of Federal jurors in the Western District of New York is a departure from the decisions of the United States Supreme Court and is in conflict with the policy of establishing uniform standards in selecting Federal jurors.

Statutory Provisions Involved

The statutory provisions involved are 18 U. S. C. section 1951; 18 U. S. C. section 371, and 18 U. S. C. section 2314. They are printed in Appendix A, *infra,* pp. 12-15.

Statement

In a two-count Indictment, the petitioner, CHARLES CACI, also known as, BOBBY MILANO, was accused of violating Title 18 U. S. C. 1951 (Anti-Racketeering Statute, commonly known as the Hobbs Act) alleging that he and others conspired to obstruct interstate commerce by robbery, and violation of 18 U. S. C. 371 (the General Conspiracy Statute), alleging that he and others conspired to transport in interstate commerce "goods, wares, merchandise, securities and money of the value of Five Thousand ($5,000.00) Dollars or more knowing the same to be stolen" in violation of Title 18 U. S. C. section 2314. Following an approximately four (4) week trial by jury, the petitioner CHARLES CACI, also known as, BOBBY MILANO, together with four (4) co-defendants was found guilty under both counts.

On December 11, 1967 the Hon. John O. Henderson, the United States District Judge for the Western District of New York, sentenced the petitioner CHARLES CACI, also known as, BOBBY MILANO, to a term of ten (10) years imprisonment on the first count and five (5) years imprisonment on the second count, both terms to run concurrently.

The case was appealed to the Court of Appeals for the Second Circuit, which court affirmed the conviction in an Opinion decided July 30, 1968. A Petition for a Re-Hearing was filed, which was subsequently denied on October 8, 1968.

Reasons for Granting the Writ

I.

The instant conviction raises an important question concerning the intended scope of a Federal statutory provi-

sion, namely, section 1951 of Title 18 United States Code, the so-called "Hobbs Act".

The Supreme Court has never addressed itself to the question of whether the conduct upon which the present conviction is based is within the Federal legislative control intended in the "Hobbs Act."

The applicability to analogous situations presently within the sole jurisdiction of the States, and the potential extensions and ramifications which are latent within the principle upon which this conviction rests is of such broad consequence as to warrant a final determination by the Supreme Court.

Simply stated, the first count of the Indictment charges a conspiracy to obstruct, delay and effect commerce by robbery of money and property belonging to and in the care of Armored Transport of Los Angeles, Inc. This count is based on alleged violation of 18 U. S. C. section 1951 (the pertinent provisions of which are reprinted in Appendix A, p. 12) popularly known as the "Hobbs Act."

That the "Hobbs Act" was not intended to be all pervasive is indicated by the fact that section (c) of section 1951 exempts certain statutes from its reach.

Furthermore, the "Hobbs Act" was passed in 1946 following the decision of the United States Supreme Court in *United States v. Local 807,* 315 U. S. 521, 62 S. Ct. 642, wherein the court had occasion to interpret section 2 of the Federal Anti-Racketeering Act of 1934, 48 Stat. 979,[2] the predecessor to the "Hobbs Act."

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[2] "Any person who, in connection with or in relation to any acts in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(Footnote continued on following page)

In the *Local 807* case, the Supreme Court held that the exception provided in section (a) of section 2 covered efforts by members of a truck drivers' union to exact wages by violence from non-union truck owners driving trucks to their destination.

The "Hobbs Act" accomplished its narrow design by eliminating the exclusion clause involved in the *Local 807* case.

The legislative history of the "Hobbs Act" makes clear that the Congress, in considering an amendment to the Anti-Racketeering Act, contemplated the elimination of a specific evil, that is, the "use of robbery and extortion under the guise of obtaining wages and the obstruction of interstate commerce." 91 Congressional Record 11,900.

There is absolutely nothing in the legislative history of the "Hobbs Act" to suggest that the Congress, by including the term "robbery" in the amendment to the Anti-Racketeering Act, which itself made no express reference to that term, intended to assume if not pre-empt the responsibility and indeed the right of the States to enforce its own laws against the ancient, common law crime of robbery.

It is perhaps significant that the "Hobbs Act" remained within Chapter 95 of Title 18 which is entitled "Racketeering" as opposed to being included in Chapter 103 of Title

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(Footnote continued from preceding page)

"(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence or coercion, for the payment of money or other valuable considerations for purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) obtains the property of another, with his consent, induced by wrongful use or force or fear, under color of official right;

"(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b):"

18 which concerns exclusively with acts involving robbery and burglary which constitute crimes against the United States.

The "Hobbs Act" was special purpose legislation seeking to address specific mischief, *U. S. v. Green,* 350 U. S. 415, 76 S. Ct. 522. That the spirit and intent of the use of the term "robbery" was especially designed to proscribe the robbery on the highways which the Supreme Court exempted from the reach of the Anti-Racketeering Act of 1934 in the *Local 807* case.

The Congressional debate literally teems with expressions which support this construction of the act. One illustration will suffice for present purposes.

> "Mr. Cox: . . . the sole purpose of the Bill which the pending rule is intended to make in order is to undue the outrageous opinion of the Supreme Court in the Teamsters Union Case, where that case legitimatized highway robbery when committed by a labor goon". 91 Cong. Rec. 11841 (1945).

In addition, there are several references by the author of the Bill to the effect that the proscription against robbery contemplated a robbery committed in a particular fashion, namely, the highway robbery variety. 91 Cong. Rec. 11901, 11914 (1945).

During the twelve year life span of the Anti-Racketeering Act of 1954, there is not a single reported case to disclose a prosecution for the kind of acts made the subject of the instant indictment.

Indeed in the single instance of a reported case involving a conviction for a "Hobbs Act" violation based upon circumstances amounting to robbery, the facts disclose the "highway" character of the robbery, thus clearly bringing

it within the intendment of the Act. *U. S. v. DeSisto,* 329 F. 2d 929.

Other than this innovation represented by the "Hobbs Act" proscription against "highway robbery," the predominant theme is much like that which pervaded its ancestral legislation, namely, the prevention of extortionate conduct affecting interstate commerce. Consequently, the element of extortion is to be found in almost every case decided under the Hobbs Act.[3]

There is no significant difference between the facts of the case at bar and the most commonplace robbery which occurs on the streets of our cities any number of times every day of the year.[4]

The fact that the point of origination of the alleged conspiracy was in Buffalo, New York and a substantive crime was to be committed in the State of California is wholly immaterial since it is the adverse effect upon commerce which is the gravamen.

Thus, for the above reasons the court should determine whether or not the conduct upon which the present conviction rests is within the Federal legislative control intended in the "Hobbs Act."

II.

The court should consider whether the requirements of "substantial due process" were violated by allowing

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[3] See *e.g., Stirone v. United States,* 361 U. S. 212, 80 S. Ct. 270; *Carbo v. U. S.,* 314 F. 2d 718 (C. A. Cal. 1963), cert. den. 377 U. S. 953, 84 S. Ct. 1625, reh. den. 377 U. S. 1010, 84 S. Ct. 1902, and *U. S. v. Provenzano,* 334 F. 2d 678 (3rd Cir. 1964), cert. den. 379 U. S. 947, 85 S. Ct. 440.

[4] "During calendar year 1966, there were 153,420 robberies committed in the United States, a substantial increase over the 134,680 estimated offenses recorded in this classification in 1965. * * * There were an average of 420 robberies every day in 1966." Uniform Crime Reports for the United States—1966, issued by John Edgar Hoover, Director of the Federal Bureau of Investigation.

a conviction under Count Two of the Indictment to rest upon proof which utterly failed to demonstrate that the petitioner Charles Caci, also known as, Bobby Milano possessed the necessary *mens rea.*

Count II of the instant indictment charges all of the co-conspirators with a violation of section 371 of Title 18, United States Code. The latter section provides in pertinent part:

> "whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud; * * *"

The record is entirely barren of any evidentiary suggestion that the petitioner Caci was aware that the jewelry and money alleged to be the subject of the conspiracy under the second count of the Indictment was to be transported into interstate commerce. The single reference to the ultimate disposition of the property after the consummation of the proposed robbery is to be found in the testimony of Pascal Calabrese when he refers to the conversations at the February 5, 1965 meeting at Natarelli's home in Buffalo, New York, at which Caci was not present. It was there that Calabrese was allegedly advised that the jewelry was to be given to Cino who was to deliver it to his uncle in San Francisco, California, the same to be fenced and the money delivered to Buffalo, New York. There is absolutely no indication that defendant Caci was apprised of this aspect of the conspiracy. Viewing the evidence in a light most favorable to the Government, together with all reasonable inferences which might be drawn therefrom, *Glasser v. U. S.*, 315 U. S. 60, 80, 62 S. Ct. 457, on this record it cannot be said that Caci's knowledge extended beyond the fact that there was to be a proposed robbery.

It is axiomatic that a conviction for conspiracy requires evidence of the same intent or knowledge as to convict one charge with the substantive offense made the object of the conspiracy. *Ingram v. U. S.*, 360 U. S. 672, 79 S. Ct. 1314. The two principal ingredients of Title 18 U. S. C. 2314 is (1) the transporation in interstate commerce of (2) stolen goods or money knowing the same to have been stolen.

In *United States v. Crimmens,* 123 F. 2d 271 the defendant was charged with conspiring to transport stolen securities and interstate commerce. The record was bereft of any proof that the defendant knew that his confederates were bringing stolen bonds into the state. The Court reversed judgment of conviction and held that there could be no conspiracy to cause stolen securities to be transported into interstate commerce unless it is understood by the conspirators to be part of the venture that the securities cross state lines.

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal" *U. S. v. Crimmens, supra,* at 272.

Nor can it be said that it was an implied term of the agreement that the proceeds from the proposed robberies be transported across state lines from California to Buffalo. *U. S. v. Crimmens, supra* at 273.

In *United States v. Sherman,* 171 F. 2d 619, on a record not dissimilar to that which confronts this Court in terms of the question of Caci's knowledge, the Court held that in a prosecution for conspiracy to steal, carry away and conceal goods while moving in foreign commerce, the evidence must demonstrate the defendant's knowledge that the goods were stolen from foreign commerce.

In *Nassif v. U. S.*, 370 F. 2d 147, 153 a case involving an alleged violation of Title 18 U. S. C. 371, the Court states that knowledge of the interstate character of goods allegedly converted out of interstate commerce constituted a prerequisite of proof. Nor does it suffice to assert that the law does not require knowledge of all the details of the conspiracy, *Bloomenthal v. U. S.*, 332 U. S. 539, 68 S. Ct. 248 since the fact of proposed transportation of the stolen money and goods into interstate commerce was an essential ingredient of a substantive crime and not a mere detail. In sum, it is clear that Caci did not have sufficient knowledge to conspire to commit a Federal offense; and to sustain a conviction under Count II of the Indictment is violative of substantial due process.

III.

The petitioner Caci joins in the reasons relied upon for granting the Writ as submitted in behalf of the petitioner Frederico G. Randaccio relating to the court's refusal to instruct the jury with respect to an alibi defense. (Petition for a Writ of Certiorari submitted in behalf of Frederico G. Randaccio).

It was clear that other counsel also relied in part upon the alibi defense to be offered by Randaccio (R. 575, 2078). Therefore, said reasons are consequently incorporated herein by reference.

IV.

The petitioner Caci joins in the reasons relied upon for granting the Writ as submitted in behalf of the petitioner Randaccio relating to the issue of whether or not the selection of Federal jurors in the Western District of New York

is a departure of the decisions of the United States Supreme Court and is in conflict with the policy of establishing uniform standards in selecting Federal jurors. (Petition for a Writ of Certiorari submitted in behalf of Frederico G. Randaccio).

Therefore, said reasons are consequently incorporated herein by reference.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals should be granted.

Respectfully submitted,

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Bobby Milano,
605 Brisbane Building,
Buffalo, New York 14203.

APPENDIX "A"

Statutes

CHAPTER 95—RACKETEERING

Sec.
1951. Interference with commerce by threats or violence.

§ 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or propert in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

"Any person who, in connection with or in relation to any acts in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence or coercion, for the payment of money or other valuable considerations for purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) obtains the property of another, with his consent, induced by wrongful use or force or fear, under color of official right;

"(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b);"

§ 371. Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 § 2314 CRIMES AND CRIMINAL PROCEDURE

Note ½

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent, State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altering, or counterfeiting any security, or tax stamps, or the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87—371, § 2—75 Stat. 802.

1961 AMENDMENT. Pub. L. 87-371 inserted "or tax stamps" following "securities" in the third paragraph and following "security" in the fourth paragraph, and "fraudulent State tax stamps," in the catchline.

1956 AMENDMENT. Act July 9, 1956, amended section by inserting after first par., paragraph relating to interstate transportation of persons in schemes to defraud.

LEGISLATIVE HISTORY: For legislative history and purpose of Act July 9, 1956, see 1956 U. S. Code Cong. and Adm. News, p. 3036 See, also, Pub. L. 87-371, 1961 U. S. Code Cong. and Adm. News, p. 3264.

APPENDIX "B"

Opinions and Judgments Below

[2820] JUDGMENT AND COMMITMENT.

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CHARLES CACI, a/k/a BOBBY MILANO.

Indictment No. Cr-1967-115.

On this 11th day of December, 1967 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant upon a verdict of guilty on November 21, 1967, has been convicted of the offense of unlawfully and wilfully conspiring to obstruct and delay commerce and the movement of money and property in commerce by robbery, in violation of Section 1951, Title 18, U. S. C., (Ct. 1); unlawfully and wilfully conspiring to transport or cause to be transported in interstate commerce goods, money, etc. in excess of ($5,000.00), knowingly the same to have been stolen, in violation of Section 371, Title 18, U. S. C., (Ct. 2).

in Counts One and Two

as charged

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary, being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count One-Ten (10) years in an institution designated by the Attorney General.

Count Two-Five (5) years in an institution designated by the Attorney General. Sentence on Count Two to run concurrent with sentence imposed on Count One.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN O. HENDERSON,
United States District Judge.

ROLAND E. LOGEL,
Clerk.

A True Copy. Certified this 13th day of December 1967.

(Signed) ROLAND E. LOGEL,
Clerk.

(By) ALICE MANNING,
Deputy Clerk.

Approved: JOHN T. CURTIN,
U. S. Attorney.

By ANDREW F. PHELAN,
Assistant U. S. Attorney.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.
(Argued June 18, 1968 Decided July 30, 1968.)

Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

Moore and Hays, Circuit Judges, and Timbers, District Judge.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

Affirmed.

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* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Appellant Caci.

Peter L. Parrino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, Circuit Judge:

Appellants Charles Caci, Stephen A Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy

guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth $400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. § 1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of the statute outlawing "robbery or extortion"[1] which affects

[1] 18 U. S. C. § 1951 (1964):
"Interference with commerce by threats or violence.
(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(Footnote continued on following page)

commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe. "The proper function of legislative history is to solve and not to create an ambiguity." *United States v. Blasius,* Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a bona-fide employer to a bona-fide employee." In *United States v. Local 807, Teamsters Union,* 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this

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(Footnote continued from preceding page)

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1964). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the ligitimate activities of organized labor. See, *e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, *e.g.*, 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, *e.g.*, 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance that the terms robbery and extortion would not be extented beyond their established meanings, see, *e.g.*, 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States v. De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction

under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States,* 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States v. Sherman,* 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied *sub nom. Grimaldi v. United States,* 337 U. S. 931 (1949); *United States v. Fox,* 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was a crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were

not corroborated, it would be sufficient to support the conviction. See *Caminetti v. United States,* 242 U. S. 470, 495 (1917); *United States v. Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his

alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the de-

fendant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States v. Olweiss*, 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request.

See *United States v. Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby v. United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52 (a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p. m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witnesses who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States v. Vita,* 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. § 605 of a telephone conversation between one Fitzgerald and appellant Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun v. United States,* 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States,* 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter regis-

tration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, *e.g., United States v. Kelly,* 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States v. Agueci,* 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§ 1861-71 (Supp. July, 1968). As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay v. New York,* 332 U. S. 261, 277-78 (1947). See also *Hoyt v. Florida,* 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commissioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. § 1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by

reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. § 1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States v. Flynn,* 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin v. United States,* 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, *e.g., United States v. Echeles,* 352 F. 2d 892, 898 (7th Cir., 1965); *DeLuna v. United States,* 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the inability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *DeLuna* and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant.

United States v. Kahn, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1957). See *Smith v. United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod v. United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes v. United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett v. United States*, 377 U. S. 980 (1964). See also *United States v. McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States v. Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morning of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and

detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. *Cf. United States v. Hoffa,* 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States v. Mattio,* 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. § 2314. See *United States v. Walker,* 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States,* 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack,* 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno,* 385 F. 2d 387, 380-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

STEPHEN A. CINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Stephen A. Cino, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 30, 1968.

Opinions Below

The opinion of the Court of Appeals printed in Appendix A, hereto, *infra,* is reported in *United States* v. *Caci, et al.,* 401 F. 2d 664. The unreported opinion of United States District Judge John O. Henderson, W.D.N.Y., dated October 24, 1967, relating to the jury selection issue, is printed in the companion petition for certiorari herein for

petitioner Frederico G. Randaccio (No. 715), at pp. 50-51. The unreported opinion of District Judge Henderson, dated November 30, 1967 (R. 2813-2815), relating to electronic monitoring, is printed in appendix D hereto, *infra*. Relevant excerpts from the unreported opinion of District Judge Henderson, dated October 3, 1967, relating to electronic monitoring and search-seizure leads derived therefrom (R. 2658-2659) are printed in appendix E hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 30, 1968 (Appendix B hereto, *infra*). By respective orders of Mr. Justice Harlan petitioner Cino's time within which to file his petition for certiorari herein was extended to September 28, 1968 and then to December 7, 1968. During the period of the latter extensions of time petitions for re-hearing and re-hearing *en banc* were pending in the Court of Appeals, Cino being a party thereto. An order by the panel of the Court below denying the petitions for re-hearing was entered October 14, 1968 (Appendix F hereto, *infra*). But the petitions for re-hearing *en banc* in the Court below continued undecided until December 18, 1968, when an order was entered denying the petitions for re-hearing *en banc*, Circuit Judge Irving R. Kaufman dissenting (Appendix G hereto, infra). This petition for certiorari is submitted as being timely on the basis of the thirty days running from the date of denial of the petitions for re-hearing *en banc* in the Court below (December 18, 1968).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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* See petitioner Cino's application to Mr. Justice Harlan served and filed December 6, 1968, and the letter from the Clerk of this Court to Abraham Glasser dated December 11, 1968.

Questions Presented

1. Does the Hobbs Act (18 U.S.C. §1951) support this prosecution for conspiracy to commit robbery which would affect commerce (count 1 of the indictment), in view of the absence of any element of racketeering, extortion or "highway robbery"? Is not such application of the Hobbs Act an unconstitutional invasion of the police power of the States and of substantive due process under the Fifth Amendment?

2. Supplementing question 1, does not this Hobbs Act prosecution constitute an improper and unconstitutional aggrandizement of the Federal commerce power, in view of the extreme attenuation of the Federal power to prosecute for crime thereby created, especially since no robbery was ever carried out in effectuation of the conspiracy charge?

3. Supplementing questions 1 and 2, are not the aggrandizement and the attenuation of Federal power, exemplified in this case, a threat to our *Federalistic* constitutional system which this Court should examine at this particular juncture when all-important constitutional opportunities are going to be needed for the purpose of flexibly adapting the structures and the facilities of constitutional power in this country for constructive social-governmental solutions of the problems of racial discord and of excessive governmental centralism—problems whose solution, that is, may well have to depend upon a creative constitutional open-mindedness in devising larger scope for regional, state or local (or even ethnically "separatist") authorities in the use of governmental or *quasi*-governmental power?

4. Was petitioner Cino denied a fair due process trial by the circumstances surrounding the use of uncorroborated accomplice testimony? Does *Bruton* v. *United*

States, 391 U. S. 123, favor a re-examination of the peculiar trend of the Federal case law of recent decades—a trend against which there is authoritative current judicial ferment—whereby the "better practice" rule of *Holmgren* v. *United States,* 217 U. S. 509, 523-524 (that jury instructions should include a requirement of corroboration of accomplice testimony) has practically become reduced to a dead letter by what appears to be sheer judicial inadvertence in the decisions of the lower Courts?

5. Was petitioner Cino denied his constitutional right to a fair and impartial jury under the Sixth Amendment, and under Federal statutory and judicial standards, by reason of the methods used in this case to obtain the names of prosepective trial jurors and to compile the trial jury list?

6. Was petitioner Cino denied a fair due process trial and a fair jury trial (Fifth and Sixth Amendments) by the refusal of relief, in both of the Courts below, concerning inflammatory prejudicial publicity in local radio broadcasts which denounced the defendants as members of the "Cosa Nostra" during the evening and morning immediately preceding the submission of the case to the jury?

7. Was petitioner Cino denied his Fourth Amendment rights by electronic monitoring—a trespassory room bug involving co-petitioner Randaccio, and a telephone interception involving co-petitioner Sorgi—which produced investigative leads, and (in the case of the telephone interception) produced vital prosecutive evidence consisting of master keys to the Beverly Hilton Hotel in Los Angeles, the scene of the alleged conspiracy-intended robberies?

8. Was petitioner Cino denied a fair due process trial by the refusal of the trial Court to instruct the jury

with respect to the alibi defense of the co-petitioner Randaccio, and is not our contention in this regard aided by this Court's decision of December 16, 1968 in *Johnson* v. *Bennett*, October Term 1968, No. 32? If there was error in this refusal to instruct the jury, does not the prejudice directly affect petitioner Cino, since the Randaccio alibi, if believed would fatally impeach the entire operative testimony of the sole accusing witness (the accomplice Calabrese) as to the alleged inception and organization of the conspiracy charged in both counts of the indictment?

9. Was petitioner Cino denied a fair due process trial by the reception in evidence of post-conspiracy hearsay testimony from the accomplice witness Calabrese?

10. Was petitioner Cino denied a fair due process trial, and did the Government fail to prove an essential element of the case under count one of the indictment, in view of the fact that the proof adduced to establish the interstate commerce character of certain checks which allegedly would have been stolen in pursuance of the conspiracy if the robbery of the armored car messenger had ever happened (which it never did), consisted solely of "proof" that on some (not all) of certain allegedly relevant days in February 1965 such checks were included in the allegedly potential "loot" and that *statistically* such checks were customarily so included? In this criminal prosecution does not such "proof" fail under the standards of the "no-evidence" rule of *Thompson* v. *Louisville*, 363 U. S. 199, and indeed does it not fail for sheer failure to prove the requisite interstate commerce *corpus delicti*? And is not the point here urged fortified by the circumstance that the alleged conspiracy remained at all times in an amorphous condition as regards the question of *when* the conspirators might or might not undertake to carry out the robbery of the armored car messenger?

11. In view of the total circumstances of the case, is not the imposition on petitioner Cino of a jail sentence of twenty years cruel and unusual punishment (Eighth Amendment)?

12. Was the evidence insufficient for submission to the jury or for conviction?

13. Cumulatively, do the errors and violations of law here involved require reversal of the conviction on grounds of due process of law?

14. Petitioner Cino joins in the questions presented in the respective petitions of the co-petitioners herein insofar as applicable to his case.

Constitutional and Statutory Provisions Involved

The case involves all relevant provisions of the United States Constitution which pertain to the division of "commerce" and "police" powers between the States and the United States, and to reservation of powers of the States and the People.

It also involves the Fourth Amendment (search and seizure), Fifth Amendment (due process), Sixth Amendment (jury trial), and Eighth Amendment (cruel and unusual punishment).

The case also involves 18 U.S.C. §§371, 1951, and 2314; these statutory provisions are printed in Appendix C hereto, *infra.*

Statement of the Case

Petitioner Cino was convicted, after a jury trial, in the United States District Court for the Western District of New York (Henderson, D. J.), on one count of conspiracy to commit a robbery which would affect commerce in violation of 18 U.S.C. §1951 (Count 1), and one count of conspiracy to transport stolen goods in interstate commerce in violation of 18 U.S.C. §§371 and

2314 (Count 2). He was sentenced to twenty years on the first count and five years on the second count, to run concurrently.

This petition for *certiorari* is companion with the petitions of four other defendants who were convicted in the same trial (Caci, No. 720; Natarelli, No. 474; Randaccio, No. 715; Sorgi, No. 1112 Misc.). To avoid unnecessary repetition, we shall keep our statement of the case short.

Cino's twenty year jail sentence may fairly be said to be the result, literally, of testimony by a single accomplice witness, Pascal Calabrese. We would thus emphasize at the outset that there is no corroboration of Calabrese's testimony linking Cino to this case, nor is there any other proof inculpating Cino except Calabrese's uncorroborated testimony. And Calabrese is the classic "accomplice witness", *i.e.*, a witness of destructively impeached credibility, the usual self-confessed "accomplice" chronic prevaricator (*e.g.*, 377-387, 420-421, 439-449, 457, 459-461).

The indictment charged in the first count that petitioners conspired to rob an armored car messenger at a Los Angeles hotel (the Beverly Hilton), and in the second count that they conspired to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest (Mrs. McCune) at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected; the robbery of the guest (Mrs. McCune) had been set in the alleged conspiratorial plan as prerequisite, or as being in a time priority, to the robbery of the armored car messenger.

Calabrese testified that on December 29, 1964 he had robbed the Buffalo City Hall of a large amount of money, had then gone into hiding, and had been contacted

on February 4, 1965 by the within petitioner Cino who told him that Natarelli and Randaccio wanted to meet with him to have him carry out certain robberies out of town. The next evening (February 5) Calabrese went to Natarelli's house where Cino and Natarelli were present; Randaccio arrived about a half hour later, and then Natarelli and Randaccio gave Calabrese the details of the planned robberies, which were to take place at the Beverly Hilton Hotel in Los Angeles. Calabrese was to be helped in Los Angeles by the within co-petitioner Caci, and by the within co-petitioner Sorgi who was in charge of security at the hotel. Cino also was to go to Los Angeles to help Calabrese. First, Calabrese was to rob Mrs. Walker McCune of jewelry worth about $400,000. After that he was to rob the armored car messenger who picked up the hotel's daily receipts. Cino was to take the stolen jewelry to a relative in San Francisco who would "fence" it, and then Cino would bring the proceeds back to Buffalo. Calabrese went to Los Angeles, arriving there February 7, 1965, Caci meeting him at the airport. Cino came to Los Angeles February 10. Caci, Calabrese and Cino were in varying degrees of contact with Sorgi at Los Angeles. Sorgi instructed Calabrese as to the hotel layout, showed him around the hotel, assured him of Sorgi's ability to protect the planned robbery actions through his (Sorgi's) position as the hotel's security officer, and all of the alleged conspirators awaited the arrival of Mrs. McCune at the hotel; she was expected to arrive by February 12. However, Mrs. McCune became ill and did not go to the Los Angeles hotel. Caci, Calabrese, Cino and Sorgi kept in contact over the next several days as they kept waiting or hoping for Mrs. McCune's arrival. However, on February 17, Mrs. McCune still not having arrived, the alleged conspiracy became thwarted when word was received from Buffalo that the police were looking for Cal-

abrese in connection with the City Hall robbery; at this, the alleged conspirators scattered, Cino leaving Los Angeles for Buffalo on February 17, and Calabrese leaving Detroit on February 18. On February 22 Calabrese surrendered himself to the authorities at Buffalo, was released on bail that afternoon, and thereafter met one or more times with Randaccio and Natarelli; these latter meetings resulted in indefinite postponement or termination of the Los Angeles project.

While the Government introduced copious and varied proof corroborating aspects of Calabrese's testimony, none of such corroboration touched in any way the matter of tying Cino into the case; the corroboration consisted of such items as hotel or apartment records fixing Calabrese's own location at pertinent times, etc. As we above suggested, Cino's alleged involvement in this case rests solely on uncorroborated testimony of the accomplice witness Calabrese.

The Government's proofs to show the element of interstate commerce are noted in our "Reasons", *infra*.

The United States Court of Appeals for the Second Circuit affirmed the convictions (Appendix A hereto, *infra*). Petitions for re-hearing and for re-hearing *en banc* were denied—these petitions involved issues as to jury-selection procedure in the Western District of New York (details *infra*).

Reasons for Granting the Writ

I.

This is apparently the first prosecution under 18 U.S.C. §1951 (Hobbs Act) in which the issue of applicability of this statute to ordinary "Common law" robbery has been litigated and judicially considered and decided. The only "precedent" invoked by the court below is *United States*

v. *DeSisto,* 329 F. 2d 929 (C. A. 2, 1964), cert. denied 377 U. S. 979, involving the hijacking of a truck with no elements of labor racketeering or extortion being present—as is also the case here. But in *DeSisto* the question of such statutory coverage of "robbery" was not raised or expressly decided. This issue of statutory coverage was, apparently, assumed by all concerned in *DeSisto* as not being an issue.

The instant case, then, is a case of first impression on this very important question of whether the Hobbs Act was intended by Congress to put the Federal law enforcement Establishment into the field of prosecuting "robbers" all over the United States whenever an "interstate commerce" "handle" can be ratiocinated.

In referring to this question as being a very important question, we are sure we do not exaggerate. In its impingement upon basic constitutional choices, this question takes one into what is probably the single most persistent (and perhaps also the single most fundamental) area of constitutional debate from the earliest times of this Nation down to the present time. For, this is a case that touches, or can touch, in a decisive *historic* degree, the whole dynamic of our system of *constitutionally limited* governmental power of a *federalistic* nature in this country.

The American doctrine of constitutional limitations has a unique two-fold character. Not only do we have specific constitutional limitations of a "Bill of Rights" character, but we also have the whole built-in system (in our Constitution) of what Professor Corwin termed "dual Federalism". It is one unhappy sign of the temper of our times that a lawyer or a Judge may nowadays hesitate to incur the risk of being thought banal if he were to refer also, in a discourse like the present one, to the old-fashioned phrase "checks and balances."

The perspectives of our constitutional history, in which expansion of the Federal commerce power is a true monument of the John Marshall Court and of the Court's achievements in the aftermath of the Depression of the 1930's, are not lost upon present counsel. But present counsel would also venture to suggest that to all of us, who enjoy this perspective, it is proper to ask, in the face of a Federal criminal prosecution of the present kind, "Upon what meat doth this our Commerce power feed that it hath grown so great"?

When Congress enacted the Hobbs Act in 1946 (18 U.S.C. §1951), supplanting the Anti-Racketeering Act of 1934 (48 Stat. 979, 980), there can be no doubt of the object at which Congress was really aiming. Congress was not aiming at a plenary take-over of the police powers of the States for the punishing of any and all "robbers" whose "loot" (or conspiracy-intended loot) would or might in some way "affect" "commerce". The Court below (Appendix A hereto, *infra*) has cited various passages from the legislative history of the Hobbs Act. *Inter alia,* in its survey of that legislative history, the Court below referred to the House Judiciary Committee Report of 1945 (*U. S. Code Congressional Service,* pp. 1360-1370 (1946)), and the Court below mentioned that the Hobbs Act was passed for the purpose of over-ruling *United States* v. *Local 807, Teamsters Union,* 315 U. S. 521, involving certain labor union interferences in interstate trucking activities. The last mentioned House Committee Report cannot be read as having been aimed at anything except these "racketeering" types of interference (see especially pp. 1369-1370, *U. S. Code Cong. Serv., loc. cit.*).

It will not do to say, as the Government and the Court below maintain in the present case, that the Hobbs Act simply is to be read "on its face", and that the language of that Act "on its face" unqualifiedly puts the Federal

Government into the prosecutive business of punishing any and all "robbers" who "affect" or may "affect" "commerce". This will not do because such an "on-the-face" reading of this legislation, or of any similar Federal legislation, instantly collides or may collide with our Federalistic distribution of powers between the State and National Governments. In other words, the very existence of our constitutional system of dual Federalism imports, *eo ipso*, into this category of federal statutory interpretation, an intrinsic element of *constitutionally founded doubt or ambiguity*. Putting it in another way, there is so to say an ever-abiding constitutional "presumption" against assertions of Federal legislative power which trench too egregiously upon the reserved legislative domain of the States under our Federal system. Or, putting it in still another way, the problem of statutory interpretation in a case like this one is not satisfied by merely "interpreting" a term such as "robbery" plus a term such as "commerce" (or "affecting commerce"). On the contrary, the problem of statutory interpretation in such a case requires that one bear constantly in mind the underlying and controlling test of Federalism.

Nothing in the constitutional history of the commerce clause supports the use of the Federal power in a case like the present one. Was Federal prosecution of the present defendants needed or justified in the interest of a "uniform national rule" for regulation of "commerce"? Was this one particular band of alleged "robbers" (of the ordinary sort) so plainly beyond the reach of State punitive facilities, are such alleged "robber" bands generally throughout the country so beyond such State reach, that the tricky and specious processes of Federal aggrandizement here involved have to be constitutionally endured?

Nor, as we suggested in our Questions Presented, is the question here solely a question of the Commerce Power or of Federalism. The question additionally is one of *sub-*

stantive due process. As above said, our system prizes itself as being one of constitutional limitations. The dual form of our constitutional limitations vindicates the claims of both individual citizens and of the Federally component State sovereignities. When the Federal Government wants to take over a function tradititionally reserved to the States—here, the prosecution of "robbery"—is it not an intrinsic part of the constitutional rights of the individual citizen that he shall be allowed to challenge the assertion of Federal power over him on the ground that the Federal Government does not possess the particular power because it belongs to the States and has been forbidden to the Federal Government—that is, there is in such a case a constitutional limitation against the Federal Government's assertion of the power, and there is a concomitant individual right to challenge the assertion. By this same reasoning, our analysis comes to the topic of *substantive due process.* The familiar theorem for the substantive due process inquiry goes thus:—Does there exist at all a power to legislate concerning a given subject matter, and if so, has the legislative body chosen means reasonably adapted to the accomplishment of the permitted legislative object? Apply that test here. First, does there exist at all a Federal power to invade the traditionally State-reserved power to punish "robbers"? Concededly, there is such a Federal power, generically speaking, in the *proper* "interstate commerce" area or in other areas of explicit Federal purview or of "necessary and proper" incidental Federal purview. But what of the instant exercise of such Federal power, under the Hobbs Act as here applied? Does the instant legislation, as here applied, comply with the substantive due process test that the legislative means shall be reasonably adapted to the accomplishment of the permitted legislative object? We would be most intrigued to see a rationally convincing argument from the Government in support of the idea that

it is so plainly "necessary and proper" for Federal criminal prosecutors and Federal Courts to pursue alleged "robbers" of the instant type that the traditional State purview in such cases must give way as a matter of "substantive due process".

In our Questions Presented, *supra,* we suggested that the seemingly infinite aggrandizement and proliferation of the Federal Commerce-Clause-based power to punish ordinary "State" crime poses a great threat to the whole future civic or social safety of this country in the present era. Negro groups are passionately insisting, right now, on one or another form of separatism; and the white community is hearkening to these proposals with utmost earnestness. Elsewhere through our social fabric today massive agitations are underway, and are being earnestly considered by influential elements in the society, with a view to one or another kind of redistribution of "power" or "authority" to satisfy autonomous strivings of a regional, or local, or other nature. Students of the history of ancient civilizations which broke down after similar processes of stress and tension may well be concerned right now about the ability of our American society to find the needed adaptive devices for healthy survival as a society and as a nation. One of the most useful abilities that the genius of this country has evolved for meeting this kind of task is the institution that we call Judicial Review. In the coming period there is a strong likelihood that the Courts may face litigation aimed at a curbing of the powers of the Federal Government, in the interest of decentralization of governmental power. This case of ours which is now before this Court, this unattractive case of an alleged band of ordinary conspiratorial thieves, affords an opportune occasion for this Court to speak a message that may prepare for the soothing of unimaginably destructive storms of social strife in the soon-looming future.

II

The Court below treated our contention concerning accomplice testimony as presenting the issue of "the sufficiency of the evidence, * * * on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict" (Appendix A hereto, *infra*, p. 9a). In response to this contention of ours the Court below said (*ibid.*):

> "Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were not corroborated, it would be sufficient to support the convictions. See *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); *United States* v. *Agueci*, 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963)."

First, as seen, although Calabrese's testimony "was corroborated in several respects", undisputedly it was not corroborated *at all* as regards linking Cino personally in any way with the commission of the crimes charged (see *Wigmore On Evidence* (3d Ed.), §2059, emphasizing the need to identify a particular defendant with participation in the crime).

Petitioner Cino was entitled to ask that the testimony of the accomplice witness be weighted in scales of a more traditional caliber of justice than that which seems to have become the fashion in the lower Federal courts under the supposed "rule" that accomplice testimony need never be corroborated.

This supposed "rule", as we are about to show, is nothing more nor less than the result of an evolutionary process of misapprehension by various lower Federal courts who have misread the controlling decisions of this Court

on the subject. The true and correct (and the just) Federal rule, we shall show, is not that the dispensing with any requirement of corroboration of accomplice testimony is a "rule" of invariable application, but that it is the "better practice" to require corroboration. The circumstances of the present case called for the use of such "better practice" here.

We are not urging the Court to depart in any precedent-shattering way from what is commonly regarded as being the established Federal rule that corroboration of accomplice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the decisions noted *infra*, that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by *proper* corroboration.

Holmgren v. *United States*, 217 U. S. 509, 523-524 states that "It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been critized, disparaged or departed from in any doctrinal sense by the Court in any other decision, including *Caminetti* v. *United States*, 242 U. S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said, "This is so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U. S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States*, 244 U. S. 432, expressly undertook to examine whether there had been corroboration of the accomplice

testimony (at pp. 449-442). The *Valdez* case arose in the then Territory of the Phillippine Islands; from the report of the decision in *Valdez,* and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 et seq.) it does not appear that the case involved any statutory or constitutional provision applicable to the Phillippines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.G., *Sykes* v. *United States,* 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States,* 209 Fed. 525, 533 (C.C.A. 8 1913; *United States* v. *Murphy,* 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis* v. *United States,* 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States,* 266 Fed. 1012, 1014-1016 (D.C. App. 1920); *Wagman* v. *United States,* 269 Fed. 568 (C.C.A. 6 1920) *Morenkow* v. *United States,* 276 Fed. 293 294 (C. C. A. 6 1921); *Rudner* v. *United States,* 281 Fed. 516, 521 (C. C. A. 6 1922); *Rossi* v. *United States,* 9 F. 2d 362, (C. C. A. 8 1925); *Lett* v. *United States,* 15 F. 2d 686, 689 (C. C. A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, e.g., *Arnold* v. *United States,* 94 F. 2d 499, 501, 506 (C. C. A. 10 1938); *Stewart* v. *United States,* 131 F. 2d 624 (C. C. A. 5 1942), cert. denied 318 U. S. 779; *Gordon* v. *United States,* 164 F. 2d 855 (C. C. A. 6 1947), cert. denied 333 U. S. 862; *Smith* v. *United States,* 224 F. 2d 58 (C. A. 5 1955); *Stanley* v. *United States,* 245 F. 2d 427 (C. A. 6 1957); *Osborne* v. *United States,* 351 F. 2d 111 (C. A. 8 1965); *Masters* v. *United States,* 351 F. 2d 105 (C. A. 8 1965).

Of the cases cited in the preceding paragraph we especially invite attention to the language of the Eighth Circuit in the *Sykes* case *supra;* and to the *Murphy* case from

the Northern District of New York, *supra.* In the latter case, the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case, and to similar decisions of the lower Federal courts, said (253 Fed. at 406) that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached." But when the accomplice witness has been impeached, the *Murphy* Court said, "The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *."

We submit that this stalwart and discerning language written in 1918 in the *Murphy* case, *supra,* embodies the correct historical and traditional perspective of the Federal accomplice-corroboration rule, and that it states a theme which this Court should now restate.

We disparagingly referred above to the post-*Caminetti* decisions of many of the lower Federal Courts on the issue of corroboration of accomplice testimony. We (counsel here) are not alone in expressing concern or dissatisfaction in this regard. See, especially, *McMillen* v. *United States,* 386 F. 2d 29, 32-36 (C. A. 1, 1967). Even *Wigmore's* treatment, which (as is to be expected) is not strongly sympathetic to the corroboration requirement (which Wigmore points out exists in nearly half of the American States), leaves the reader with a deep sense of disturbance over the unfairness of any unqualified rule dispensing with the need for corroboration. *Wigmore On*

Evidence (3d Ed.) §§2056-2059. Of similar mixed viewpoint and purport is *Orfield, Corroboration Of Accomplice Testimony In Federal Criminal Cases,* 9 Villanova Law Review, pp. 15 et seq. (1963).

The presently immediate importance, indeed urgency, of an undertaking by this Court by way of re-examination of the Federal accomplice-corroboration rule, is illustrated in what is now going on in the State of New York, one of the statutory corroboration-requirement States (N. Y. Code Crim. Proc. §399), where a Law Revision Commission has been recommending repeatedly for the last several years that the corroboration requirement be dropped. See *Temporary Commission On Revision Of The Penal Law And Criminal Code, Proposed New York Criminal Procedure Law, 1968 Study Bill And Commission Report, published by Edward Thompson Co.,* at p. 27; and the similar publication for the year 1967, at p. 72. Indeed, since at least the late 1930's this same New York Law Revision Commission (or predecessor bodies) has been pushing for such a repeal, but thus far unsuccessfully (*Orfield, Op. Cit. supra,* at p. 35). And, interestingly, during this same period two additional State jurisdictions, Alaska and Arizona, have adopted the corroboration requirement (*Wigmore Op. Cit. supra,* 1964 Pocket Supp. p. 93).

Furthermore, we respectfully find in this Court's reasoning in *Bruton* v. *United States,* 391 U. S. 123, persuasive doctrinal expressions disfavoring the reliability of uncorroborated accomplice testimony, or at least strong suggestions to that effect.

Taking the circumstances of the present case as a whole, the recent ferment among Courts and legal scholars above mentioned, the always implicitly acknowledged sense of dissatisfaction with the fairness of the non-corroboration alternative as above noted, and the language of *Bruton*

just referred to, we earnestly request the Court to utilize this case as a vehicle for a comprehensive re-examination of the prevailing Federal Court rule that corroboration of accomplice testimony is never required.

III

The question of the constitutional fairness of the jury-selection procedure in this case was the subject matter of the petitions for rehearing and rehearing *en banc* in the Court below. As seen, the Panel denied rehearing, and the *en banc* application was also denied, but with a dissent by Circuit Judge Irving R. Kaufman (appendix G hereto, *infra*).

In view of the full treatment of this subject contained in the companion petition of Randaccio (No. 715) we respectfully adopt that presentation, plus relying on the benefit which may accrue to our position on this point by virtue of Judge Kaufman's dissent from the denial of the petitions for rehearing *en banc* in the Court below.

IV

We are advised that the companion petition herein for Caci (No. 720) argues the issue of prejudicial publicity occasioned by local radio broadcasts on the evening and morning immediately preceding the submission of the case to the jury herein. We respectfully adopt Caci's presentation, and add that, as stated in *United States* v. *Grieco*, 261 F. 2d 414, cert. denied 359 U. S. 907, while "* * * it was long the rule that a Court would refuse to inquire in any way whatever as to what had occurred during the jury's deliberations * * * the rigidity of this doctrine has been relaxed * * *" (citing decisions of this Court).

V

There were two separate electronic monitorings in this case. One involved a trespassory bugging of a private home where co-petitioner Randaccio was present (described in the Government's Brief In Opposition to the companion petition herein for Natarelli, no. 474, at pp. 6-7). The other involved interception of a telephone conversation involving co-petitioner Sorgi, which resulted in the Government's obtaining one of the most damaging single items of evidence in this prosecution, namely, Beverly Hilton Hotel master keys found in the possession of co-petitioner Caci. We are advised that the within companion petitions for Caci (no. 720) and Sorgi (no. 1112 Misc.) treat this subject, and we respectfully adopt those presentations, adding that we particularly rely on *Osborn* v. *United States,* 385 U. S. 323; *Katz* v. *United States,* 389 U. S. 347; and *Lee* v. *Florida,* 392 U. S. 378.

VI

On the issue of the trial Court's refusal to instruct as to the Randaccio defense alibi, we respectfully rest on the presentation in the herein companion petition of Randaccio (no. 715), adding that additional support for this position is found in this Court's decision of December 16, 1968 in *Johnson* v. *Bennett,* October Term 1968, no. 32, which emphasizes the injustice of a trial Court's rulings relating to alibi when the result of such rulings is to convey to a jury, or to make possible a jury impression, that the burden of proof as to alibi may diminish a defendant's right to rely on the prosecution's failure to sustain its burden of proof under the rule of reasonable doubt.

VII

As to the issue of post-conspiracy hearsay, we contend that when the then Los Angeles-located defendants (Caci,

Cino, Sorgi—plus Calabrese) as of February 17, 1965, learned that Calabrese was being sought by the Buffalo City police for the City Hall robbery, the conspiracy later that day came to an effective end under any fair legal contemplation, and that the reception in evidence of Calabrese's testimony as to alleged happenings subsequent thereto was a violation of the post-conspiracy hearsay rule (*Lutwak* v. *United States,* 344 U. S. 604; *Fiswick* v. *United States,* 329 U. S. 211). This post-conspiracy testimony by Calabrese appears at R. 254-266, and it was especially damaging because it connoted to the jury that one or more of the defendants were maintaining an attitude of relentlessness even though their alleged conspiratorial project had been decisively thwarted.

VIII

In our Question Presented no. 10 we have challenged the Government's proofs, under the first count of the indictment (conspiracy to rob the armored car messenger), as not only insufficient, but as coming under the ban of the "no evidence" rule of *Thompson* v. *Louisville,* 362 U. S. 199, insofar as concerns proof of the interstate commerce character of checks supposed or expected to be contained in the Beverly Hilton Hotel pick-up which the conspirators were said to be planning to take by robbery. We may be mistaken in our interpretation of the Government's proof on this subject, but from our reading of those proofs it appears that those proofs consisted only of the following: (1) Government's exhibit G-38, plus testimony of the American Express Company employee Tracy (R. 1065 et seq.), which produced American Express Company checks deposited by the hotel on February 12, 13, 14 and 16, 1965 (R. 1072-1073); (2) testimony by an accountant witness, Mr. Stepien (R. 1228-1230), which yielded a "statistical" opinion that some 59 percent of the hotel's checks received from guests were drawn on out-of-State banks.

As to the American Express travelers' checks, there appears to be no proof at all for the days February 15 and February 17, which are of essential materiality under the Government's own theory as to the operative time span of the conspiracy (February 5 or 12 to February 17).

As to the other checks (out-of-State), is it possible that mere "statistical" "proof" of this sort is sufficient for criminal conviction under a charge of the present kind?

Moreover, the evidence is undisputed that no definite time whatever was set for the alleged planned robbery of the armored car messenger (count 1). This was to take place, under the Government's theory, only after the jewelry robbery of Mrs. McCune, which never came about. And if the Government is right in having been allowed to put in evidence what we above termed the post-conspiracy proofs, whereunder the defendants are depicted as having continued their conspiratorial intention even after the thwarting of the conspiracy on February 17, 1965 (when the conspirators scattered upon learning that Calabrese was "wanted" for the Buffalo City Hall robbery), then surely there is no *proved definite* time for the armored car messenger robbery, and there is no proof of the "interstate commerce" character of the contents of the armored car pouch supposititiously to be robbed.

The Government cannot have it both ways. Either the trial was unfair for failure to prove "interstate commerce" checks within a defined or reasonably limited time span, or the trial was unfair because of the reception of the prejudicial post-conspiracy proofs.

On the former alternative, the case is, as we have said, a sheer "no evidence" case; indeed, the case is a "no evidence" case on the second alternative, *a fortiori*. Indeed, further, it is a case of sheer failure to prove the requisite "interstate commerce" *corpus delicti*.

IX

As to petitioner Cino's remaining contentions (Questions Presented Nos. 11, 12, 13, 14), we respectfully rest upon all of the foregoing and upon the respective petitions of the co-petitioners herein.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
PETER L. PARRINO,
Attorneys for Petitioner,
Stephen A. Cino.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.

(Argued June 18, 1968 Decided July 30, 1968.)

Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

MOORE and HAYS, *Circuit Judges*, and TIMBERS, *District Judge*.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, *Chief Judge*, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. §1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§371 and 2314.

Affirmed.

* Of the District Court for the District of Connecticut, sitting by designation.

PAUL IVAN BIRZON, Buffalo, New York, *for Appellant Caci.*

PETER L. PARRINO, Buffalo, New York, *for Appellant Cino.*

SALTEN RODENBERG, Buffalo, New York, *for Appellant Natarelli.*

FRANK G. RAICHLE, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), *for Appellant Randaccio.*

JOSEPH P. RUNFOLA, Buffalo, New York, *for Appellant Sorgi.*

ANDREW F. PHELAN, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. §1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. §1951 and in the second count that appellants conspired in violation of 18 U. S. C. §371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth

$400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was

known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. §1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of

the statute outlawing "robbery or extortion" [1] which affects commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe, "the proper function of legislative history is to solve and not to create an ambiguity." *United States* v. *Blasius*, Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a

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1 18 U. S. C. §1951 (1964):

"Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

. . . ."

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

bona-fide employer to a bona-fide employee." In *United States* v. *Local 807, Teamsters Union,* 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1946). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the legitimate activities of organized labor. See, e.g., 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, e.g., 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, e.g., 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance

that the terms robbery and extortion would not be extended beyond their established meanings, see, e.g., 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States* v. *De Sisto,* 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States* v. *Sherman,* 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied sub nom. *Grimaldi* v. *United States,* 337 U. S. 931 (1949); *United States* v. *Fox,* 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were not corroborated, it would be sufficient to support the convictions. See *Caminetti* v. *United States,* 242 U. S. 470, 495 (1917); *United States* v. *Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Ran-

daccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P.M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the defendant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States* v. *Olweiss*, 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his

objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request. See *United States* v. *Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby* v. *United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52(a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p.m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross-examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that

Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witnesses who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States* v. *Vita*, 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. §605 of a telephone conversation between one Fitzgerald and appellant Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun* v. *United States*, 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone* v. *United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter registration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, e.g., *United States* v. *Kelly,* 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States* v. *Agueci,* 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§1861-71 (Supp. July, 1968). As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay* v. *New York,* 332 U. S. 261, 277-78 (1947). See also *Hoyt* v. *Florida,* 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commis-

sioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. §1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. §1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States* v. *Flynn*, 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, e.g., *United States* v. *Echeles*, 352 F. 2d 892, 898 (7th Cir. 1965); *De Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the in-

ability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *De Luna* and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant. *United States* v. *Kahn*, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1967). See *Smith* v. *United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod* v. *United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes* v. *United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett* v. *United States*, 377 U. S. 980 (1964). See also *United States* v. *McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. §2314 until the goods have in fact been stolen is without merit. Cf. *Williamson* v. *United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn

whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morning of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. Cf. *United States* v. *Hoffa*, 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States* v. *Mattio*, 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. §2314. See *United States* v. *Walker*, 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick* v. *United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States* v. *Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States* v. *Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges,
HON. WILLIAM H. TIMBERS,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, a/k/a BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, a/k/a PAT NATRELLI, FREDERICO G. RANDACCIO, and LOUIS SORGI,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consolidation Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and and they hereby are affirmed.

A. Daniel Fusco
Clerk
By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

Statutory Provisions Involved

Title 18 U.S.C. Section 371.

Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . June 25, 1948, c. 645, 62 Stat. 701."

Title 18 U.S.C. Section 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . . As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, Section 2, 75 Stat. 802."

Appendix C

Title 81 U.S.C. Section 1951.

Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Pos-

session, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

APPENDIX D

Opinion of District Judge (November 30, 1967)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CHARLES CACI, a/k/a BOBBY MILANO, STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI.

CR. 1967-115

Prior to the trial of this case, the government acknowledged that during the period encompassed by the indictment two of the defendants were on premises which by trespass were subject to electronic surveillance by a government agency. Surveillance logs three months prior to and during the indictment period, and thereafter to cessation of surveillance, have been carefully and thoroughly reviewed by the court in camera.

Each of these defendants has an interest in determining whether or not any leads or evidence obtained through that surveillance have tainted the investigation or trial of this case. This court, of course, recognizes its duty to insure that no such taint does exist.

Initially, it should be noted that in the course of this trial the court has carefully examined the entire govern-

ment file covering the investigation and prosecution of the case. Were there the slightest doubt as to whether the contents of these logs could have produced leads or evidence helpful in the investigation or prosecution of the case, the necessity for disclosure of the logs in toto and for a full and complete hearing would be clear.

From the court's in camera scrutiny, however, the nature and contents of the logs are such that the court is fully able to certify and find beyond a reasonable doubt that no evidence or leads could have resulted from them. Satisfied that the matters contained therein are totally irrelevant and immaterial to the present investigation and prosecution, the court is mindful of the fact that a number of third parties could be affected by disclosure of the contents of these logs. Under the peculiar circumstances of this case, the court is persuaded that the interests of justice would not be served by any further disclosure.

The government staff investigating and prosecuting this case has repeatedly offered to submit proof that it was totally unaware of the contents of these logs, did not have access to them, and received nothing from anyone by reason of this surveillance which aided in the prosecution of this case. In addition, the government offers to establish the independent sources from which all information and evidence developed. In view of this offer, despite this court's findings that the contents of the logs are totally irrelevant and immaterial, the court at the request of one or more of the defendants will immediately conduct such a limited inquiry.

A demand for such an inquiry will be filed with the court no later than December 1, 1967, at 2:00 p.m.

So ordered

/s/ JOHN O. HENDERSON
John O. Henderson
United States District Judge

Dated: November 30, 1967.

APPENDIX E

Relevant Excerpts from Opinion of District Judge (October 3, 1967)

The Tape Recordings Secured by the Beverly Hills Police

On the basis of the testimony of Sergeant Egger, the court finds the conversations in question were taped with the knowledge and consent of Fitzgerald. The transcription of those tapes has been reviewed by the court and on the basis of that review the court has substantial reservations as to the materiality and relevance of the contents of those tapes to the issues raised by the indictment. The legality of their use, therefore, may become moot.

For the present, however, on the basis of *Lopez* v. *United States,* 373 U. S. 427 (1963), the court will deny the defendants' motions to suppress. In the event an offer is made by the Government, the parties should be prepared to argue the effect upon *Lopez, supra,* if any, of the Supreme Court's later decision in *Osborn* v. *United States,* 385 U. S. 323 (1966).

The Arrests of the Defendants Caci and Sorgi

On the basis of information secured from Sweeney, from investigation into illegal use of a credit card, from Fitzgerald, and from the conversations overheard by him, the court finds that Sergeant Egger had probable cause to arrest the defendant Caci and, further, that the gun, mask and keys which were secured were properly seized incidental to that arrest.

Since the statements of Sorgi to the arresting officers are to be suppressed and no further evidence is sought to be used by the Government, there is no need to consider the validity of his arrest.

APPENDIX F

Order (By Panel of Court of Appeals) Denying Petition for Rehearing (Entered October 14, 1968)

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Stephen A. Cino,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

LEONARD P. MOORE
PAUL R. HAYS
U.S.C.JJ.

WM. H. TOMKINS
U.S.D.J.

October 4, 1968

APPENDIX G

Order and Memorandum of Court of Appeals Denying Petitions for Rehearing *En Banc* (Entered December 18, 1968)

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI,

Defendants-Appellants.

Petitions for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellants Charles Caci, Stephen A. Cino, Frederico G. Randaccio, and Louis Sorgi, and all the active circuit judges having voted to deny the petitions, with the exception of Judge Kaufman who votes to grant the rehearing,

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied.

Judge Kaufman votes to grant a rehearing in banc for the sole purpose of deleting the sentence in the panel

opinion reading, "In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U.S.C. §1864 (1964) to reject prospective jurors as not 'qualified' for reasons other than those listed in §1861. See United States v. Flynn, 216 F. 2d 364, 386-88 (2d. Cir. 1954), cert. denied, 348 U.S. 909 (1955).", Slip Sheet at 3301, because it might be misconstrued as approving a grant of discretionary power to clerks or jury cimmissioners to select jurors. In place of this sentence, Judge Kaufman would insert the following: "The methods used to select the jury here did not result in any denial of liberty without due process of law or prejudice to the defendants."

J. Edward Lumbard
Chief Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 715

FREDERICO G. RANDACCIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 720

CHARLES CACI, ALSO KNOWN AS BOBBY MILANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 954

STEPHEN A. CINO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1112 Misc.

LOUIS SORGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 401 F. 2d 664.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1968. Petitions for rehearing in Nos. 715, 720 and 1112 Misc. were denied on October 8, 1968. The petition for a writ of certiorari in No. 715 was filed on November 6, 1968. The petitions for certiorari in Nos. 720 and 1112 Misc. were filed on November 8, 1968, and are out of time under Rule 22–2 of the Rules of this Court. A petition for rehearing *en banc* in No. 954 was denied on December 18, 1968, and the petition for a writ of certiorari was filed on January 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy to obstruct commerce through robbery, charged in count one, constituted a crime within the reach of the Hobbs Act.

2. Whether there was valid evidence which sustained the convictions on both counts.

3. Whether the trial court erred in its charge in the following particulars:

> (a) In failing to give the alibi instruction requested by Randaccio (raised in Nos. 715, 720 and 954).

(b) In instructing that the government need not establish that petitioners knew or understood that their plan would delay or obstruct commerce (raised in No. 715).

(c) In instructing that the charge of a planned interstate transportation of stolen property would be sustained even though the property was first converted into cash (raised in No. 715).

4. Whether the method of compiling the jury list was improper (raised in Nos. 715, 720 and 954).

5. Whether the district court erred in determining for itself, after an *in camera* inspection, that records of an electronic surveillance were irrelevant to the prosecution (raised in Nos. 954 and 1112 Misc.).

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part as follows:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property,

or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of conspiracy to obstruct commerce through the robbery of Armored Transport, Inc. of Los Angeles, California, in violation of the Hobbs Act, 18 U.S.C. 1951. They were also convicted, under a separate count, of conspiracy to transport in interstate commerce goods of the value of $5,000 or more, knowing them to be stolen, in violation of 18 U.S.C. 2314. This second conspiracy embraced both a plan to rob Mrs. Carole McCune of jewelry and a plan to rob Armored Transport, Inc.[1] On December 11, 1967, Randaccio and Cino each were sentenced to concurrent terms of imprisonment for twenty and five years. Caci and Sorgi each were sentenced to concurrent terms of imprisonment for ten and five years (R. 2518–2521, 2819, 2822, 2823, 2820).[2] The court of appeals affirmed.

The government's evidence is recounted in considerable detail in the opinion of the court of appeals

[1] Co-defendant Natarelli was also convicted on both counts; his petition for a writ of certiorari is pending (No. 474, this Term).

[2] "R." refers to the record, "G.A." to the government appendix in the court of appeals (a copy of which we are lodging with the Clerk of this Court), and "G.E." to government exhibits.

(see Pet. in No. 715 App. A 34–37). On December 29, 1964, Pascal Calabrese (the key government witness at trial) robbed the City Hall in Buffalo, New York, and then went into hiding (R. 377, 385). On February 4, 1965, Cino invited Calabrese to meet with co-defendants Natarelli and Randaccio, whom Calabrese had known for several years (G.A. 2–3). Cino said they had lined up a couple of "scores", meaning "armed robberies". The meeting of the four men was held on the following evening at Natarelli's house at 60 Manchester Drive in Buffalo (G.A. 8–9, 46–48). Randaccio and Natarelli there explained to Calabrese a plan for two robberies at the Beverly Hilton Hotel in Los Angeles: first, the robbery of jewelry worth approximately $400,000 belonging to Mrs. McCune, who was planning to visit the hotel; and, second, the robbery of an "Armored Transport" messenger, who picked up the daily receipts at the hotel. Randaccio further told Calabrese that Caci would meet him in Los Angeles and introduce him to Sorgi, who was in charge of security at the Beverly Hilton Hotel; and that Cino would come to Los Angeles "a couple of days" later and would assist him in the robbery. He further told Calabrese that Cino would take the jewelry to San Francisco, to "fence" it, and then bring the proceeds back to Buffalo. He would later return to Los Angeles to give Calabrese his share (G.A. 9–11). Natarelli and Randaccio gave Calabrese money for his expenses and promised that Caci would give him more in Los Angeles (G.A. 11–12).

Two days later, on February 7, Calabrese flew to

Los Angeles. He met with Caci. They both registered at a Hollywood apartment house, Calabrese under the name "Peter O'Hara". Caci explained that the woman who had the jewelry was acquainted with both him and Sorgi, which was the reason they had arranged for Calabrese to rob her. Sorgi, he said, was in full charge of security at the Beverly Hilton and would conceal everything (G.A. 13–17).

Two days later, Caci and Calabrese met Cino at the airport. Cino had brought them more money for expenses (G.A. 18). That evening, the three discussed the robberies with Sorgi. The latter said that Mrs. McCune was expected to arrive by the weekend, and that she would have jewelry worth from four to five hundred thousand dollars with her. As for the robbery of the armored truck messenger, Sorgi thought that it would be "good for maybe $100,000". He said the security officers would not tell the police about the jewelry theft and that if there was no "heat" because of it they would be able to rob the truck during the same week (G.A. 19–23).

On February 11, Sorgi took Calabrese to the Hilton Hotel. They visited the suite on the eighth floor which Mrs. McCune, the owner of the jewelry, usually occupied when she was in town. Sorgi also showed Calabrese an item from the hotel's security file pertaining to a previous robbery of some $80,000 worth of Mrs. McCune's jewelry. Calabrese also was shown a messenger from Armored Transport making his daily pickup and then passing through a tunnel to his truck. Later Cino, Caci and Calabrese worked out

their plans for robbing the messenger. At that time Cino showed them a key which he said would open all the rooms in the hotel (G.A. 25–31). When Mrs. McCune failed to arrive as expected, Sorgi telephoned her and was told that she was delayed due to illness (G.A. 33).

On February 17, Calabrese received a report through Cino that he was being sought by the police in Buffalo and that Randaccio had said that he should remain where he was (G.A. 37–39). Calabrese, however, returned to Buffalo and surrendered to the local authorities (G.A. 40–41).

To corroborate Calabrese's testimony, the government (*inter alia*) adduced the testimony of Mrs. McCune concerning her telephone conversation with Sorgi regarding her failure to arrive at the hotel as scheduled. She further testified that she had reserved the hotel suite in January and usually brought approximately $500,000 worth of jewelry with her when she visited Los Angeles. There was further testimony from the manager of the Sunset Terrace Apartments in Hollywood. He stated that in February 1965 apartments were rented to B. Milano (petitioner Caci) and to a Mr. O'Hara. Among the items seized from Caci at the time of his arrest was a key ring containing a master key for the Beverly Hilton Hotel (G.A. 90–94). There were various other exhibits which confirmed aspects of Calabrese's testimony (see, *e.g.*, G. Ex. 1, G.A. 4, 6, 12, 45; G. Ex. 51, G.A. 69; G. Exs. 19–21, G.A. 44, 96).

ARGUMENT

1. Petitioners Caci and Cino argue that their convictions for a conspiracy to violate the Hobbs Act (count one) were invalid because that Act was meant to apply, not to all robberies that might affect commerce, but only to extortionate conduct or highway robberies.[3] The language of the statute, however, draws no such distinctions. As this Court pointed out in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act "speaks in broad language manifesting a purpose to use all the Constitutional power Congress has to punish interference with interstate commerce by extortion, *robbery* or physical violence" (emphasis added). See, also, *Battaglia* v. *United States,* 383 F. 2d 303, 305 (C.A. 9), certiorari denied, 390 U.S. 907; *United States* v. *Pranno,* 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944. Cf. *United States* v. *Nardello,* No. 51, this Term, which interpreted the companion Travel Act, 18 U.S.C. 1952, so as to effectuate Congress' intent to aid the States by combatting the interstate activities of organized crime. That the legislative history of the Hobbs Act neither requires nor warrants a narrowing of the express statutory terms, as urged by petitioners, is demonstrated in the opinion of the court below (401 F. 2d at 667–668). The statute, in short, is properly applicable to the conspiracy to rob charged in count one. See *United*

[3] See Caci Pet. 3–7; Cino Pet. 9–14.

States v. *DeSisto,* 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979.[4]

Equally specious is petitioner Randaccio's contention (R. Pet. 14–18) that a conspiracy to rob the checks from the Armed Transport service would not "affect" commerce. The company was an independent contractor, maintaining a messenger service for pickup and delivery of monies from a number of different business establishments. The pouch from the Beverly Hilton would be placed in the company's vault overnight and then delivered, on another route, to the bank, where out-of-state checks were mechanically segregated and thereafter routinely forwarded to correspondent banks or to the appropriate Federal Reserve Bank. Approximately 59 percent of the checks received by the hotel during the period of the conspiracy were drawn on out-of-state banks (G.A. 9), and about 80 percent of the American Express travelers' checks negotiated at the hotel during this period went to the American Express office in New York City (G.A. 74–75). This is enough to bring the statutory proscription into play. See *Stirone* v. *United States, supra,* 361 U.S. at 215; *United States* v. *Kramer,* 355 F. 2d 891, 896–898 (C.A. 7), partially vacated and remanded on other grounds, *Kramer* v. *United States,* 384 U.S. 100. Indeed, the very cases relied upon by this petitioner hold that where an object has left the owner's possession and has come into the possession

[4] The attempt by petitioner Caci to distinguish *DeSisto* as a "highway robbery" overlooks the fact that the definition of robbery contained in the statute makes no such distinction (see 18 U.S.C. 1951(b)(1), *supra,* pp. 3–4).

of someone who, without more than inevitable pauses, is to pass it along on an interstate journey, it has entered interstate commerce. *United States* v. *Fox*, 126 F. 2d 237, 238 (C.A. 2); *United States* v. *Sherman*, 171 F. 2d 619 (C.A. 2), certiorari denied, *sub nom. Grimaldi* v. *United States*, 337 U.S. 931.

2. The various evidentiary claims are not well taken.

a. Petitioner Cino contends that the evidence was insufficient to sustain his conviction on the ground that the testimony of Calabrese lacked corroboration directly implicating him (Cino Pet. 15–20). The federal courts, however, do not require corroboration of the testimony of an accomplice to support a conviction. *E.g., Caminetti* v. *United States*, 242 U.S. 470, 495; *United States* v. *Marks*, 368 F. 2d 566 (C.A. 2), certiorari denied, 386 U.S. 933; *United States* v. *Maddox*, 394 F. 2d 297 (C.A. 4).

Nor is there sufficient reason submitted to warrant reexamination of that rule in this case. The court here instructed that the testimony of an accomplice should be received with caution and weighed with great care; that the jury should not convict a defendant on the unsupported testimony of an accomplice unless it believed such testimony beyond all reasonable doubt; and that since Calabrese had been a perjurer in the past, the jury should, for that reason also, consider his testimony with caution and weigh it with great care (G.A. 158–159). Moreover, although the extensive evidence corroborative of Calabrese's testimony did not specifically implicate Cino, it supported Calabrese's account of the circumstances from the initial invitation extended by Cino to Calabrese in Buffalo

through the various meetings of the conspirators after Cino brought them more money in Los Angeles (*supra*, pp. 5–7). Since this corroborative evidence directly supported portions of Calabrese's testimony, it gave weight to the overall credibility of his testimony—including his incriminatory testimony as to Cino. See 7 Wigmore, *Evidence* (3d. ed.) § 2059, p. 327.

b. Similarly without merit is Caci's contention that the evidence was insufficient to sustain his conviction on Count 2 (conspiracy to transport stolen goods in interstate commerce) because it was not shown that he knew that part of the plan was to send the proceeds of the jewelry theft to Buffalo (Caci Pet. 7–10). As the court of appeals pointed out (401 F. 2d at 669), "Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo". Cf. *Pereira* v. *United States,* 347 U.S. 1.

c. Cino urges that "post-conspiracy hearsay" was erroneously admitted in evidence, referring to pages in the record involving two conversations (Cino Pet. 21–22). This contention was not made in the court below, and there are no exceptional circumstances which might nevertheless justify review. *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16. At all events, the claim is without substance. After Calabrese returned to Buffalo and surrendered to the police on a charge uncon-

nected with the present case, he met Cino in a restaurant and asked him, "How is that score on the coast?" Cino replied, "Still there, don't worry about it, you have enough trouble right now." On the following weekend, Calabrese met Randaccio and asked, "How about this woman out there with the jewelry and the armored truck?" Randaccio's reply was, "Don't worry about it, you have enough heat on you. We'll have a score for you later. Take care of yourself right now" (G.A. 42). The conversations took place within the period of the conspiracy as alleged in the indictment and, contrary to petitioner's claim that the conspiracy was at an end when they were made, these statements showed its continued vitality. Furthermore, the first conversation, with Cino himself, clearly was not hearsay and was admissible against him. The conversation with Randaccio was merely repetitive.

3. None of the alleged errors in the trial court's instructions warrant plenary review by this Court.

a. It is urged that an alibi instruction submitted by Randaccio should have been given (Randaccio Pet. 9–14; Caci Pet. 10; Cino Pet. 21). However, Randaccio failed to make a proper request in that regard. Four days before submission of the case to the jury, the court conferred with counsel relative to instructions, at which time Randaccio's counsel presented twenty-five requests, none including an alibi instruction. After some discussion about other matters, Randaccio's counsel said that he expected to give the court supplemental requests later in the day. The court said

it would like to have these as soon as possible (G.A. 126–133).

Subsequently, on the day before the case was submitted, the court read the following stipulation to the jury (G. A. 135):

> The Government and the defendant Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place. At 7:50 P.M. on that evening Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises.

Following this, the court reminded Randaccio's counsel of his previous representations that he would submit additional requests to charge (G.A. 132, 136). None was then tendered. Fifteen minutes before the appointed time for charging the jury, Randaccio's counsel, for the first time, submitted four additional written requests, one of which was the alibi instruction.[5] The court had a hasty look at the proposed

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[5] This reads as follows (R. 2805–2806): "The defendant, FREDERICO G. RANDACCIO, has raised the defense of alibi in that he had introduced proof by way of a stipulation between himself and the Government that at 7:50 p.m. on the

instructions but declined to use their language in its charge, which, in the court's view, sufficiently embodied the same principles (G.A. 165–166).

In the charge, the court instructed fully as to the presumption of innocence and the burden upon the government at all times to prove every element of a defendant's guilt beyond a reasonable doubt (G.A. 155–158). Randaccio's counsel discussed his exceptions extensively, but made no mention of the alibi instruction (G.A. 167–168). The court said in response that the lateness of the requests was not the cardinal problem, but that it believed that the principles embodied in the requested instructions had been sufficiently covered in the charge (G.A. 168). Counsel did not challenge the court's conclusion regarding an alibi instruction.

In these circumstances, petitioner should not be heard to claim prejudicial error in the court's failure to give an alibi instruction. Rule 30, F.R. Crim. P., provides that parties may file their written requests for instructions "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs" and may not "assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its

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evening of February 5th, 1965, he was at another residence in the City of Buffalo, nine-tenths of a mile away from the place where the alleged meeting of the other alleged co-conspirators was to have taken place.

"I charge you that if this proof, when taken into consideration with all the other evidence, raises a reasonable doubt in your mind as to the defendant Randaccio's guilt, then he is entitled to an acquittal."

verdict * * *". No reasonable excuse for the plain noncompliance with these requirements appears on this record. The defense introduced medical testimony pertinent to the alibi defense during the trial. Counsel's ability was apparent from the numerous instructions offered and the care with which exceptions were noted. Moreover, as the court of appeals pointed out, the alibi defense was "far from compelling" (401 F. 2d at 670). Here the evidence contained in the stipulation showed only that Randaccio was present at the apartment of his friend at 7:50 p.m.; it was in no way inconsistent with Calabrese's story that Randaccio was at Natarelli's house, nine-tenths of a mile away, about 25 minutes (8:15 p.m.) later (G.A. 8–9, 46–48). See *Schuermann* v. *United States,* 174 F. 2d 397, 401 (C.A. 8); *Guthrie* v. *United States,* 207 F. 2d 19, 24 (C.A.D.C.); see, also, *Goldsby* v. *United States,* 160 U.S. 70, 77.

The further assertion that the claimed error was aggravated by the court's failure to charge at any time that the evidence as to each defendant should be separately considered (Randaccio Pet. 13) is refuted by the record. The court instructed, "You will, of course, separately weigh and determine the evidence as to each defendant and each count in the indictment; that is, you will determine the guilt or innocence of each defendant as to each count of the indictment separately" (G.A. 156).[6]

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[6] The claim that the jury may have been misled as to where the burden of proof lay (*cf. Johnson* v. *Bennett,* No. 32, this Term, decided December 16, 1968) has no basis in fact. They were told that the "burden of proof that a person is guilty beyond a reasonable doubt rests with the Government at all times; it never shifts to a defendant" (G.A. 155).

b. The contention is also made (Randaccio Pet. 18) that it was error to instruct on count one that it was not necessary that the defendants knew that the carrying out of the conspiracy would have affected commerce (G.A. 154). This was a correct statement of the law. *Nick* v. *United States,* 122 F. 2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687; *United States* v. *Varlack,* 225 F. 2d 665, 672 (C.A. 2); *United States* v. *Pranno,* 385 F. 2d 387, 389–390 (C.A. 7), certiorari denied, 390 U.S. 944. *Cf. United States* v. *Patten,* 226 U.S. 525, 543. See our brief in opposition in the *Natarelli* case (Br. in Opp. in No. 474, this Term, p. 5).

c. The instruction that a change in the form of the stolen property into cash would not warrant acquittal (G.A. 142), challenged by Randaccio (R. Pet. 22–23), was proper. *United States* v. *Walker,* 176 F. 2d 564, 566 (C.A. 2), certiorari denied, 338 U.S. 891. Randaccio's related contention that there was no proof that the money received from selling the jewelry would exceed $5,000 (Randaccio Pet. 22) is insubstantial. Value under the statute is market value at the time and place of the taking, 18 U.S.C. 2311; *Cave* v. *United States,* 390 F. 2d 58, 67 (C.A. 8); *Herman* v. *United States,* 289 F. 2d 362 (C.A. 5), certiorari denied, 368 U.S. 897; *Husten* v. *United States,* 95 F. 2d 168 (C.A. 8). The value of the jewelry was shown to be approximately a half million dollars.

4. Petitioners contend that there was a significant departure from federally mandated standards in the system here used to compile the jury list (see Randaccio Pet. 23–31). That system involved the drawing

of names from a jury box, which were derived equally from two different primary sources. The first of these sources consisted of names of persons qualified as State jurors and chosen by New York authorities from voter registration lists as well as other sources. It is claimed that non-voters were thus under-represented, as were women because the New York law permits women to claim exemption if they do not wish to serve as jurors. Voter registration lists, however, are an approved source. *Chance* v. *United States,* 322 F. 2d 201, 203 (C.A. 5), certiorari denied, 379 U.S. 823; *United States* v. *Kelly,* 349 F. 2d 720, 778 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Agueci,* 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959. Indeed they are a principal source under the recently enacted Jury Selection and Service Act, P.L. 90–274, 82 Stat. 53. And the propriety of permitting women to claim exemption from jury service is recognized. *Fay* v. *New York,* 332 U.S. 261, 277–278; *Hoyt* v. *Florida,* 368 U.S. 57.[7]

The second primary source consisted of names furnished to the federal Jury Commissioner, principally derived from "keymen". The Commissioner stated that he tried to balance the racial groups and that he told his keymen he wanted jurors who could understand the judge's charge (G.A. 106–109). It is objected that this procedure empowered the Commissioner to impose standards not fixed by statute (Randaccio Pet. 28–29). The statute in force at the time this case was tried, however, disqualified as a juror a

[7] In fact, three women served on the jury in this case (401 F. 2d at 671).

person who was "incapable, by reason of mental or physical infirmities to render efficient jury service". 28 U.S.C. 1861(3). This would seem sufficient to authorize the limited discretion here exercised by the Commissioner. Cf. *United States* v. *Flynn,* 216 F. 2d 354, 387 (C.A. 2), certiorari denied, 348 U.S. 909; *United States* v. *Henderson,* 298 F. 2d 522, 525 (C.A. 7), certiorari denied, 369 U.S. 878. Nor was this a blanket departure from statutory requirements resulting in a racial imbalance. See *United States* v. *Rabinowitz,* 366 F. 2d 34, 51 (C.A. 5). In any event, in view of the enactment of the Jury Selection and Service Act, *supra,* such discrepancies as may have existed in interpretation of the old statute raise no issues of recurring concern or general importance.

5. The claim that the convictions were tainted by electronic overhearings of conversations of defendants is dealt with in our brief in opposition in the *Natarelli* case (see Br. in Opp. in No. 474, this Term, pp. 6–8). Our response in that brief fully answers the claim of illegal overhearing alleged here.

There is no merit to the additional claim of petitioners Sorgi and Cino that the government violated their rights by listening on an extension telephone to Sorgi's telephone conversation with one Michael Fitzgerald. The government acted with Fitzgerald's consent. See *Rathbun* v. *United States,* 355 U.S. 107. Moreover, this conversation—a transcription of which was turned over to the defense counsel prior to trial—

was never introduced at trial, nor was any evidence that was introduced the fruit of the monitored conversation.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Attorneys.

FEBRUARY 1969.

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[8] Petitioner Sorgi raises, without arguing, a question as to whether there was a fatal variance with respect to count one, which charged that the defendants confederated and agreed to "obstruct, delay and affect commerce and the movement of money in commerce", whereas the proof was only that there may have been interference with the movement of checks (Sorgi Pet. 3). There was no objection on the ground of variance at trial. Moreover, as we point out in our brief in opposition in *Natarelli* v. *United States*, No. 474, this Term, pp. 4–5, interference with the interstate movement of checks would necessarily affect the movement of money.

Petitioner Cino also raises (Cino Pet. 20), but does not argue, the issue that the trial court erred in refusing to call back the discharged jury seven days after the verdict on the possibility that they might have heard a radio broadcast concerning the case just before the case was submitted to them. The court repeatedly instructed the jury not to listen to radio broadcasts regarding the case. There was not the slightest showing that these instructions were not followed.

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REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

1. Concerning petitioner Cino's contention of improper use of post-conspiracy hearsay (Pet. Cert. No. 954, Question Presented 9 (at p. 5), argued at pp. 21-22, with which see p. 23), the Brief in Opposition states (p. 11) that "This contention was not made in the Court below". We take it that the Government means the contention was not made in the Court of Appeals. But the point was expressly preserved at the trial (R. 262-263, 265-266; and see the related item at R. 257-258).

2. The Government has not replied to our contention that the Hobbs Act (18 U.S.C. §1951) is *unconstitutional* (Pet. Cert. No. 954, Questions Presented 1, 2, 3 at p. 3), argued at pp. 9-14). The Government treats our Hobbs Act argument solely as an argument addressed to *interpretation* of the statute (Br. in Opp. 8-9).

3. The Government has not replied to our contention of inadequacy of the proofs of the interstate commerce character of certain checks (Pet. Cert. No. 954, Question Presented 10 (at p. 5), argued at pp. 22-23).

CONCLUSION

It is respectfully submitted that this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Attorneys for Petitioner,
Stephen A. Cino.

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STEPHEN A. CINO,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING OF DENIAL OF CERTIORARI

Petitioner Stephen A. Cino respectfully prays for re-hearing of the order of March 24, 1969 denying his petition for certiorari. By order of Mr. Justice Harlan the time for filing this petition for re-hearing has been extended to May 12, 1969.

This petition for re-hearing is addressed solely to the issues presented by the two items of electronic monitoring involved in the companion group of cases (nos. 474, 715, 720, 954 (this case), and 1112 Misc.) of which this case is one. The respective petitions for certiorari in all of the cases of said companion group were disposed of on

March 24, 1969. All of those petitions for certiorari were denied except no. 474 (*Natarelli* v. *United States*) and no. 715 (*Randaccio* v. *United States*). The granting of certiorari in nos. 474 and 715 was evidently addressed to a trespassory room-bug electronic over-hearing of petitioners Natarelli and Randaccio (see the *per curiam* opinion-order of March 24, 1969 in no. 28, *Giordano* v. *United States,* first footnote). The granting of certiorari in nos. 474 and 715 evidently contemplates remand proceedings in conformity with *Alderman* v. *United States* (no. 133, Oct. Term 1967), decided March 12, 1969.

In no. 1112 Misc. (*Sorgi* v. *United States*) of the within companion group of cases, where certiorari was denied, the petitioner argued that his rights were violated by another electronic over-hearing, a listening on an extension telephone to petitioner Sorgi's telephone conversation with one Michael Fitzgerald.

The petitioner herein, Cino, in his petition for certiorari (no. 954), raised the issue as to both of the above mentioned electronic over-hearings (no. 954, Pet. Cert., Question Presented no. 7, at p. 4; and *id.,* "Reason" no. V, at p. 21).

First, although our Question Presented no. 7 raised both of the aforesaid electronic issues, our discussion of the subject under our "Reasons" at p. 21 of our petition for certiorari, which was a very short discussion mainly consisting of an adoption of those same contentions as presented in the companion petitions, did not *expressly* adopt the respective discussions of the companion petitioners in no. 474 (Natarelli) and in no. 715 (Randaccio) with respect to the electronic over-hearing of Natarelli and Randaccio. We now respectfully pray that, if such omission in our petition for certiorari was a factor in the Court's decision to deny us certiorari, our petition for

certiorari should be construed as having included, on a fair reading of our Question no. 7 and our "Reason" no. V, a due adoption of the pertinent respective treatments in the petitions for certiorari in no. 474 (Natarelli) and no. 715 (Randaccio).

Second, as to the electronic over-hearing of Natarelli and Randaccio, we take it that the granting of certiorari to those two petitioners, interpreted in conjunction with the denial of certiorari to Cino, and read also in the light of the Court's reference to *Alderman* in granting certiorari to Natarelli and Randaccio, means that Cino was denied certiorari because the Court deemed him to be without "standing" under the *Alderman* tests—i.e., the Natarelli-Randaccio over-hearing involved neither premises of Cino nor Cino's own conversations nor his presence. We now respectfully urge as follows: The Natarelli-Randaccio electronic "bugging", done in an apartment of a friend of Randaccio, occurred on February 5, 1965, a time within the instant indictment period. The indictment was filed in March 1967. The trial commenced in October 1967. On January 31, 1966 the Court granted certiorari in *Osborn* v. *United States,* 382 U. S. 1023. On December 12, 1966 the Court decided *Osborn* v. *United States,* 385 U. S. 323. On March 13, 1967 the Court granted certiorari in *Katz* v. *United States,* 386 U. S. 954. On March 20, 1967 the Court decided *O'Brien* v. *United States,* 386 U. S. 345. On May 22, 1967 the Court decided *Hoffa* v. *United States,* 387 U. S. 231. On June 12, 1967 the Court decided *Berger* v. *New York,* 388 U. S. 41. On December 4, 1967 the Court requested the Solicitor General to file a response to the petition for re-hearing in *Kolod* v. *United States,* 389 U. S. 966. On December 18, 1967 the Court decided *Katz* v. *United States,* 389 U. S. 347. On January 29, 1968 the Court granted the petition for re-hearing and the petition for certiorari and re-

manded the case, in *Kolod* v. *United States,* 390 U. S. 136. On March 4, 1968 the Court granted certiorari in *Desist* v. *United States,* 390 U. S. 943. On June 17, 1968 the Court restored to the calendar for re-argument the motion of the United States to modify the order of January 29, 1968 in *Alderman* v. *United States,* 392 U. S. 919 (formerly *sub nom. Kolod* v. *United States*). On April 22, 1968 the Court granted certiorari in *Kaiser* v. *New York,* 390 U. S. 1023. *Passim* in the course of the docketings of certain "Alderman"-issue petitions for certiorari which became docketed for the 1968 Term, the Court deferred disposition of these petitions (including the respective companion petitions herein) cited in the first footnote in the *per curiam* order-opinion in *Giordano* v. *United States,* no. 28, Oct. Term 1968 (decided March 24, 1969), evidently pending final decision on the re-argument in *Alderman, supra.* On March 12, 1969 the Court decided *Alderman* v. *United States,* no. 133 (Oct. Term 1967). On March 24, 1969 the Court decided *Desist* v. *United States,* no. 12, and *Kaiser* v. *United States,* no. 62, and on the basis of *Alderman, supra,* it disposed of the companion petitions for certiorari herein together with the several other "Alderman"-issue petitions for certiorari listed in the aforementioned first footnote in *Giordano* (*supra*). On April 7, 1969 the Court granted certiorari in *United States* v. *White,* no. 124. The significance of the foregoing chronology, for our situation, is as follows: The events in the above chronology commencing with the granting of certiorari on January 31, 1966 in *Osborn, supra,* taken together with the *Black-Schipani** electronic review procedures which developed during the second-

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* *Black* v. *United States,* 385 U. S. 26, decided November 7, 1966; *Schipani* v. *United States,* 385 U. S. 372, decided December 12, 1966.

half of the year 1966, and the aftermath of the latter review procedures (in cases like *O'Brien, Hoffa* and *Desist, supra*), have a two-fold bearing on the merits of this petition for re-hearing in regard to the Natarelli-Randaccio trespassory room-bug over-hearing as well as the Sorgi telephone over-hearing. These two-fold aspects are that of "standing", and that of "retroactivity". As to "standing" the Black-Schipani developments eventuated in decisions such as *O'Brien* (386 U. S. 345) and *Hoffa* (387 U. S. 231), *supra,* where "standing" was accorded to all defendants, not only to defendants whose conversation was over-heard or whose premises were involved or whose presence at the scene of the over-hearing was involved. Indeed, in the Brief For The United opposing certiorari in *O'Brien,* dated February 1967, p. 12, n. 5 (no. 823, Oct. Term 1966), the Solicitor General said "Although no conversation of petitioner Parisi was overheard we do not oppose the same disposition of his case as is afforded to petitioner O'Brien"; and in *Hoffa, supra,* decided May 22, 1967, the Court expressly accorded standing, for the purposes of electronic-hearing remand, "to each of the petitioners", with the pointed comment (rejecting the Solicitor General's suggestion that further electronic inquiry should be confined to the conviction of the single petitioner, Burris, whose conversations had been over-heard) that "We consider it more appropriate that each of these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction" (387 U. S. at 233). The *Kolod-Alderman* case, which likewise has apparently involved all along this same issue of "standing", was reactivated by the Court *via* its request on December 4, 1967 to the Solicitor General to file a response to the petition for rehearing in that case (*supra*—389 U. S. 966). Simi-

larly, the order of January 29, 1968, granting electronic-hearing remand relief in *Kolod* (*supra*—390 U. S. 136), and the grant of certiorari in *Desist* on March 4, 1968 (*supra*—390 U. S. 943) where the "standing" issue was necessarily involved as to two of the five petitioners,* signified the full continuing vitality of the *O'Brien-Hoffa* principle of the "standing" of all co-defendants. It was not until the decision of March 12, 1969 in *Alderman* that the Court gave any intimation that the undifferentiated right of "standing" as among co-defendants, the right which had been expressly applied as early as *O'Brien* (*supra*—March 20, 1967, 386 U. S. 345), was modified or abridged. We respectfully submit that the Court's pronouncements on "standing" commencing in *O'Brien* (March 20, 1967), so positively reiterated in *Hoffa* (May 22, 1967), and evidently followed in *Kolod-Alderman* and *Desist* down until at least March 12, 1969 (when *Alderman* was decided),** were the law until at least the latter date. If we are correct in this latter suggestion, does it not follow, in view of the Court's whole recent approach on the problem of "retroactivity" as such in *Desist* and *Kaiser*,

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* In the Brief In Opposition in Desist, p. 9 (no. 909, Oct. Term 1967), the Solicitor General, although referring to the status of the two petitioners above mentioned, conceded that, without differentiation among the petitioners, "If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand". And in the Government's brief on the merits and in its oral argument in Desist (no. 12, Oct. Term 1968) no issue was argued as to "standing".

** Incidentally the decision on the merits in *Desist* (no. 12, March 24, 1969) made no mention of the "Alderman" issue of "standing"—perhaps the "standing" issue did not have to be reached in view of the disposition of *Desist* on the basis of the non-retroactivity ruling in that case.

supra (both decided March 24, 1969), which the Court intimated in *Desist* was foreshadowed in *Fuller* v. *Alaska,* 393 U. S. 80,* that for fairness (not to say for consistency on the Court's own part), the anti-"standing" ruling of *Alderman* (March 12, 1969) should be given only prospective effect and that the prior pro-"standing" rule (of, e.g., *O'Brien* and *Hoffa*) should be controlling in all cases (including our case) which were pending on trial or on direct appeal before the March 12, 1969 decision in *Alderman?* The possible analytical anomalies posed by this latter suggestion of ours should not in themselves deter or defeat our suggestion. Rather, Mr. Justice Harlan's remark, in his dissenting opinion in *Desist* (no. 12, March 24, 1969), that "'Retroactivity' must be rethought", should be given every earnest consideration before this suggestion of ours is rejected. As regards *Desist's* adoption of the absolute "prospectivity" cut-off principle of *Stovall* v. *Denno,* 389 U. S. 293 (that the newly announced principle of the decision applies only to police action occurring after the date of such decision), i.e., as regards the problem of whether the pre-*Alderman* "standing" rule of *O'Brien, Hoffa,* etc. can benefit the within petitioner Cino, the relevant chronological considerations are entirely favorable to Cino's position. While the Natarelli-Randaccio trespassory bugging in our case occurred in February 1965—and the Sorgi telephone overhearing occurred in July 1965—and while the first recent-phase indicated disposition on the part of this Court to re-examine the whole federal electronic-eavesdropping jurisprudence may be said to have been signaled by the

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* And which the Court's overall discussion in *Desist* and *Kaiser* furthermore orients into a like non-retroactivity foreshadowing for this electronic area ever since *Linkletter* v. *Walker,* 381 U. S. 618.

granting of certiorari on January 31, 1966 in *Osborn* (382 U. S. 1023), and while *Osborn* was not decided until December 12, 1966 (385 U. S. 323), and while the initiating developments of the *Black-Schipani* review procedure did not take place until November-December 1966, all of which post-dated the police action in our case (February and July 1965), nevertheless the trial in our case commenced in October 1967, and the only electronic eavesdropping guideline for retrocativity *versus* prospectivity prior to the commencement of our trial was the analogous guideline of the Fourth Amendment ruling in *Linkletter* v. *Walker, supra* (decided June 7, 1965) which made the newly announced principle applicable to all cases then subject to direct review. That is, while the "all out" prospectivity rule of *Stovall* was announced on June 12, 1967, which was before our trial commenced (October 1967), it was not until *Desist* (March 24, 1969) that the *Stovall* rule was applied to the electronic situation. And, in keeping with our above suggestion that the Court's current "prospectivity" preference should at least itself be administered in doctrinal consistency with "prospectivity", we respectfully urge that, not only should the *Alderman* rule on "standing" be given only "prospective" effect, but that also the *Desist* rule on "prospectivity", i.e., *Desist's* adoption of *Stovall,* should itself be given only "prospectivve" effect. If we prevail in this latter argument, it would follow that (1) petitioner Cino should be given the benefit of the pre-*Alderman* rule on "standing", and (2) that such pre-*Alderman* rule on "standing" should in turn be applied to petitioner Cino in the framework of the pre-*Stovall* rule of retroactivity-prospectivity—which would mean that Cino should be given standing to litigate both of the electronic over-hearings in this case on the basis that his trial commenced (October 1967) at a time when the overall retroactivity-prospectivity doctrines of this

Court entitled a party who was complaining of electronic over-hearing to be heard on that issue in this Court if his trial commenced prior to the decision in *Desist* (March 24, 1969). Once more, we urge, not without diffidence (in view of the analytical intricacy of the problem, but it is an intricacy that seems to us unavoidable in view of this Court's own series of decisions), that the admittedly forbidding analytical task which we are here asking the Court to undertake, may claim the commendation of Mr. Justice Harlan's words in *Desist* that "'Retroactivity' must be rethought".

Second, our discussion in the last preceding paragraph was addressed primarily to the problem of petitioner Cino's standing to challenge the trespassory bugging of Natarelli-Randaccio and the telephone over-hearing of Sorgi. We have not yet touched upon the Sorgi-telephone problem as such, i.e., the problem which we realize we face regarding that Sorgi telephone over-hearing in view of the Court's having denied certiorari to Sorgi himself. Nor have we dealt systematically, as yet, in this petition for re-hearing, with the problem of retroactivity in relation to the *Desist* ruling which held *Katz* to be purely prospective (à la Stovall); our remarks in the last preceding paragraph concerning retroactivity were primarily addressed to retroactivity in relation to "standing". There remain to be considered the more inclusive aspects of the retroactivity problem in and of itself in light of *Desist-Katz.* In this paragraph we wish to speak further of the latter problem; in our next paragraph we shall speak more specifically of the Sorgi-telephone problem as such, the problem of the Court's having denied certiorari to Sorgi himself. The larger retroactivity problem of *Desist-Katz* is, in the first place, not applicable here as regards the Natarelli-Randaccio bugging, because that was a trespassory bugging of the sort deemed unlawful pre-*Katz.*

However, that *Desist-Katz* retroactivity problem does have to be faced here in regard to the Sorgi-telephone over-hearing, because it is arguable (against us) that the Sorgi-telephone over-hearing was lawful pre-*Katz* in view of *Rathbun* v. *United States,* 355 U. S. 107, since the Sorgi-telephone over-hearing was done with the consent of Fitzgerald. Our answer to this *Rathbun* aspect rests above all on the impact of *Osborn, supra* (385 U. S. 323) —plus the granting of certiorari in *United States* v. *White* (no. 124, Oct. Term 1968, cert. granted April 7, 1969), plus the impact of *Katz.* Our thought in this regard is that *Osborn initiated, Katz* confirmed, and the granting of certiorari in *White* has further confirmed, the constitutional idea that the "uninvited ear", the electronic "uninvited ear", has been subject since *Osborn* to the Fourth Amendment requirement of an advance judicial warrant complying with the requirements of probable cause, no matter by what method such electronic "uninvited ear" tries to intrude itself into private conversations. This idea must include, it would seem, any device or method for putting the "uninvited ear" into a private telephone conversation, and if this is correct it should make no difference that one party to such private telephone conversation "invited" an outside police ear, for such unilaterally invited outside police ear would still be "uninvited" by the non-inviting and non-consenting party to the private telephone conversation.* Now, it appears that the

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* In *Lee* v. *Florida,* 392 U. S. 378, the Court expressly declined to reach (on the record there) the Fourth Amendment issue under *Katz* with respect to telephone privacy. And in *Kaiser* v. *New York,* no. 62, Oct. Term 1968, decided March 24, 1969, the Court also did not reach the merits of that Fourth Amendment issue concerning telephone privacy, at least the Court did not reach that issue in *Kaiser* in a manner that would be dispositive of our present Fourth Amendment contention concerning telephone privacy *vis a vis* privacy-invasion by federal police even with "Rathbun"-type consent of one party to the conversation.

granting of certiorari in *White, supra,* which is to be considered on the merits at the next Term, must inevitably entail litigating the *contemporaneous* meaning of what the Court did in *Osborn.* That is, *White* involves the question of one-party-consensual "uninvited ear" electronic over-hearing. True, *White,* on its facts, presents that problem in relation to the "minifon" type of over-hearing (i.e., minifon plus transmitter), rather than telephone over-hearing with consent of one party. But in *Katz's* terms of the electronic "uninvited ear", the *White* and the *Rathbun* situations seem indistinguishable. Does it not follow, then, that if (as we are venturing to prognosticate) this Court's forthcoming full consideration of *White* must entail a likewise full exegesis of the *contemporaneous* meaning of *Osborn,* and of *Katz's* doctrinal relation to *Osborn,* the Court in *White* will inevitably be copying in turn with the "retroactive" doctrinal relation between *Rathbun* and *Osborn-Katz?* We especially emphasize *Osborn* in this connection, because *Osborn's contemporaneous* place in the chronology of our case, as previously noted, could well result (depending on how this Court decides *White*), in a ruling that from the doctrinal standpoint *Osborn* contemporaneously undermined (or necessarily overruled) *Rathbun*—in which event the Sorgi-telephone over-hearing in our case would be eligible for re-examination. And in such latter event, petitioner Cino might well become entitled—in view of our above discussion of the "standing" problem—to request re-examination with respect to the Sorgi-telephone over-hearing. If the Court sees merit in our foregoing argument in this paragraph, what the Court may find it appropriate to do is, that the Court may decide either to grant this petition for re-hearing subject to final disposition of the *White* certiorari, or that the Court may wish to "hold" this petition for re-hearing pending argument and decision of the

White case, and that in any event the Court may decide to permit us to file a participating brief in the *White* case. In other words, if, *per White,* the *Osborn* ruling or *Osborn* as glossed by *Katz* should be declared by this Court to have *contemporaneously* put one-party-consensual electronic over-hearing under the Fourth Amendment, we would then be in a position to urge that *Osborn* necessarily undermined or overruled *Rathbun,* in which event the retroactivity-prospectivvity problem of *Katz-Desist* would not be an impediment to the granting of certiorari to petitioner Cino in regard to the Sorgi-telephone over-hearing. For, instead, all of the relevant chronological incidences previously described would entitle Cino to claim that, both in point of standing and in point of retroactivity-prospectivity doctrine, he is entitled to the contemporaneous benefit of *Osborn* as the proper constitutional vehicle for relieving him of the supposed *Rathbun* impediment.

Third, we had above reserved for separate discussion, in the interest of analytical clarity, the problem of whether the denial of certiorari herein to Sorgi (which was done presumably on the strength of *Rathbun*) forecloses Cino from pleading the Sorgi-telephone item as a ground for certiorari—that is, whether aside from the question of Cino's standing on the Sorgi-telephone item, and aside from the larger aspect of the *Katz-Desist* retroactivity problem, Sorgi's own rights were violated by the telephone over-hearing. As the Court will have perceived from our last preceding paragraph, this question of Sorgi's own rights, a question which involves the expected forthcoming elucidation which *White* may contribute to an understanding of the *contemporaneous* constitutional impact of *Osborn,* depends on what the Court is going to decide or say in *White* about *Osborn's* impact on *Rathbun*—and/or about the combined impact of *Osborn* and

Katz on *Rathbun.* If, in *White,* the Court should decide that *Osborn* effectively destroyed the consensual rationale of cases like *Rathbun,* it would then follow that a petitioner in the position of Sorgi would have a Fourth Amendment aggrievement (invasion of telephone privacy, even though by consent of one party). And the question would then arise, (1) would Sorgi's thus newly announced Fourth Amendment right be "retroactively" available to him, and (2) would Cino's derivative right be available to him both in point of "standing" and in point of "retroactivity" for general Fourth Amendment purposes and for "standing" purposes. In short, the problem of *Rathbun versus Osborn* or of *Rathburn versus Osborn* and *Katz, viz.,* the problem of whether any and all "uninvited ear" electronic over-hearing which occurred in this case was subject to Fourth Amendment requirements, may well turn out to be a problem whose answer will be known only after this Court at the next term decides the *White* case—as we more fully set forth in another connection in our last preceding paragraph.

CONCLUSION

It is respectfully prayed that this petition for re-hearing should be granted.

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Certificate of Counsel

I certify that the foregoing petition for re-hearing is presented in good faith and not for delay (petitioner Cino is incarcerated serving his sentence and no application for bail is pending or contemplated in the present posture of the case), and that the petition is restricted, to the best belief and assurance of counsel, to the grounds specified in Rule 58(2).

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